

CHAPTER ~~63~~. COMMISSION REFERRALS , INVESTIGATIVE PROCEEDINGS AND NONINVESTIGATIVE PROCEEDINGS

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HEARINGS AND REFERRALS

Sec.

~~63.1. Commission referrals.~~

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~~63.2. Commission proceedings under section 1307-A of the act.~~

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~~63.3. Late or deficient filings—Commission proceedings under section 1304-A or 1305-A of the act.~~

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~~63.4. Non-investigative process for late or deficient filings.~~

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~~63.5. Investigative process for late or deficient filings.~~

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~~63.6. Administrative penalties for late or deficient filings.~~

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~~63.7. Commission decisions as to late or deficient filings.~~

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~~§ 63.1. Commission referrals.~~

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(a) If the Commission ~~has reason to believe that~~ an intentional violation of the act has been committed, it will refer all relevant documents and other information to the Office of Attorney General ~~and, if the lobbyist or principal is an attorney at law, to the Board~~.

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(b) ~~The Commission may, in its discretion, refer any alleged violation of Section 1307-A(f) of the act (pertaining to unlawful acts) to the Office of Attorney General for both investigation and prosecution.~~

(c) ~~The Commission will refer any alleged violation of Section 1307-A(d) of the act (pertaining to conflicts of interest) or Section 1307-A(f) of the act (pertaining to unlawful acts) to the Board if the subject of the alleged violation is an attorney at law.~~

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(d) Under section 1309-A(b) of the act (relating to ~~hearings~~) and § ~~63.4(p)~~ (relating to non-investigative process for late or deficient filings), if the Commission finds that a failure to register or report was intentional, it will refer the matter to the Attorney General for investigation and prosecution ~~and, if the person is an attorney at law, to the Board~~.

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(e) Nothing contained in the act or regulations promulgated thereunder ~~will~~ prohibit the Office of Attorney General from ~~independently~~ initiating an investigation or prosecution under the act pursuant to its authority by law, and the Office of Attorney General need not await a referral from the Commission before initiating such an investigation or prosecution.

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(f) Nothing contained in the act or regulations promulgated thereunder ~~will~~ restrict the Board's authority to discipline an attorney at law who is acting as a lobbyist or principal.

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(g) Except for a matter under section 1307-A(d)(8) of the act (relating to conflicts of interest), a referral by the Commission or the Office of Attorney General to the Board will not preclude the referring agency from also conducting its own enforcement proceeding under the act.

§ 63.2. Commission proceedings under section 1307-A of the act.

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(a) Upon receipt of a complaint as defined in § 51.1 (relating to definitions), the Commission, through its Executive Director, will conduct a preliminary inquiry into an alleged negligent or unintentional violation of section 1307-A of the act (relating to prohibited activities). A preliminary inquiry will not be conducted for matters under the act that are required to be referred to the Board for the Board's exclusive review pursuant to Section 1307-A(d)(8) (relating to conflicts of interest) or for matters involving section 1307-A(f) (relating to unlawful acts) that the Commission may, in its discretion, choose to refer to the Office of Attorney General for investigation.

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(c) Preliminary inquiries will be conducted in accordance with the procedures for preliminary inquiries set forth within section 1108 of the Ethics Act (relating to investigations by the commission) and § 21.3 (relating to preliminary inquiries), to the extent applicable.

(d) The Commission, through its Executive Director, may initiate an investigation and hold a hearing concerning alleged negligent or unintentional violations of section 1307-A of the act by a lobbyist, lobbying firm, or principal, in accordance with sections 1107 and 1108 of the Ethics Act (relating to powers and duties of commission; and investigations by commission) and, to the extent applicable, the related provisions in §§ 21.1–21.3, 21.5 and 21.21–21.27 (relating to complaints, investigations, preliminary inquiries and hearings).

(1) If the respondent does not submit a timely request for a hearing, the Investigative Division ~~will~~ have an additional 7 days beyond the respondent's deadline in which to submit a written request for a hearing.

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(2) The Commission may *sua sponte* schedule a hearing if it is determined that a hearing is needed to resolve any contested facts to make a final determination.

(e) The Commission will decide cases, issue orders and rule upon requests for reconsideration concerning alleged negligent or unintentional violations of section 1307-A of the act (relating to prohibited activities), in accordance with sections 1107 and 1108 of the Ethics Act (relating to powers and duties of the commission; and investigations by commission) and, to the extent applicable, the related provisions in §§ 21.28–21.30 (relating to decision; finality; reconsideration; and effect of order).

(f) At least four members of the Commission present at a meeting must find a violation by clear and convincing proof.

§ 63.3. Late or deficient filings—Commission proceedings under section 1304-A or 1305-A of the act.

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(a) Commission proceedings under section 1304-A or 1305-A of the act (relating to registration; and reporting) may be initiated based upon one or more of the following:

(1) Receipt of a complaint.

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(2) Information submitted by the Department, at its discretion, including but not limited to referrals or other information pertaining to late or incomplete filings, the failure to file required registration statements, and the failure to file quarterly expense reports.

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(3) A referral by the Department of any information arising from an audit, which, in the view of the Department, is appropriate for the Commission to consider.¹

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(4) Reviews of filings conducted by Commission staff.

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(5) On the motion of the Commission's Executive Director, which is based upon a reasonable belief that a violation of section 1304-A or 1305-A of the act (relating to registration; and reporting) may have occurred.

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(b) The Commission, through its Executive Director, will initiate proceedings involving section

¹ Section 1308-A(f) of the act states that the Commission may be provided with an audit report and findings if the Commission is investigating an alleged violation of the law involving the audited registration or expense report. However, the act also states that a Commission investigation may arise out of an audit. A common-sense reconciliation of these provisions suggests that the Commission may receive information regarding an audit even if there is no investigation pending.

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1304-A or 1305-A of the act (relating to registration; and reporting) under either the non-investigative procedures set forth in § 63.4 (relating to non-investigative process for late or deficient filings) or under the investigative procedures in § 63.5 (relating to investigative process for late or deficient filings).

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(1) In each case, the Executive Director of the Commission will elect which process will be followed which will be based upon the following factors, including but not limited to:

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(i) The complexity of the matter.

(ii) Whether an investigation is needed to fully review the matter.

(iii) Whether the filer has had prior notice of the requirements of the act.

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(iv) Whether the filer has in the past complied with the act.

(2) The election of the process to be followed will not be controlled by the manner in which the alleged negligent violation or noncompliance comes to the attention of the Commission.

(3) If a formal complaint is received alleging a failure to register or report as required by the act, or the filing of a report containing a false statement, the Commission through its Executive Director may elect to proceed in the matter under the non-investigative procedures of § 63.4 rather than through the investigative procedures of § 63.5.

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(4) A complainant will be notified of the Executive Director's election of the process to be followed.

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Deleted: (ii) A complainant will also be notified of the final resolution of the matter.

(5) Information received under subsection (a) of this chapter may form the basis for proceedings under either the non-investigative procedures of § 63.4, or, on the motion of the Commission's Executive Director, the investigative procedures of § 63.5.

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(c) If the Department makes a referral to the Commission based on an audit, the Commission will handle the referral through the investigative process.

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§ 63.4. Non-investigative process for late or deficient filings.²

² This section, adopted by the Committee on April 11, not only provides for a warning notice in subsections (1) & (2).

The non-investigative process for matters under section 1304-A or 1305-A of the act (relating to registration; and reporting) will include the following procedures:

(a)³ Prior to the issuance of a notice of alleged noncompliance pursuant to Section 1309-A of the act (relating to penalties), the Executive Director of the Commission will issue a warning notice to the lobbyist, lobbying firm or principal that has allegedly failed to register or report as required by the act. The warning notice may encompass multiple alleged failures to comply with the act. The warning notice will state the nature of the alleged noncompliance and the administrative and criminal penalties for failing to register, failing to file a report, or filing a report that contains a false statement or that is incomplete.

(b) The recipient of the warning notice shall have 30⁴ days from the mailing date of the warning notice in which to cure the alleged noncompliance. The Investigative Division, in its discretion, may extend the thirty-day time period for curing the alleged noncompliance. If the alleged noncompliance is not cured within the 30 day period or any extension thereof, the Investigative Division of the Commission may file with the Commission a notice of alleged noncompliance, which notice will be served upon the respondent by the Investigative Division. A notice of alleged noncompliance may encompass multiple alleged failures to comply with the act.

(c) The notice of alleged noncompliance will set forth the pertinent factual averments in numbered paragraph form and will state the nature of the alleged noncompliance and the administrative and criminal penalties for failing to register, failing to file a report, or filing a report that contains a false statement or that is incomplete. A notice of alleged noncompliance will also advise of the right to appeal from the notice, to file a written answer to the notice, and to request a hearing before the Commission. A notice of alleged noncompliance will set forth the time and manner in which to file an appeal, file a written answer, and request a hearing.

(d) An answer to the notice of alleged noncompliance must be filed (received at the Commission) within 30 days of service of the notice upon the respondent, and the notice of alleged noncompliance will include a statement to this effect. Filing of an answer is deemed to be both an appeal and a request for a hearing.

(e) An answer to the notice of alleged noncompliance shall specifically admit or deny each of the

but also a written answer (in subsection (3)), neither of which is contained in section 1309-A(a)(5) of the act.

³ The Committee has asked staff to review the logical flow of paragraphs a-x in this section. Changes in the sequence of the paragraphs have been made by staff as of 6/14/07.

⁴ The Ethics Commission Regulations allow recipients of warning notices 20 days to respond. See 51 Pa. Code § 19.3(c).

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Deleted: (3) At any time prior to a final adjudication by the Commission, the Investigative Division will have authority to negotiate settlements and to enter into settlement agreements to resolve matters under this section, which settlement agreements will be subject to review and approval by the Commission. Such settlement agreements may include arrangements for deferral or termination of proceedings prior to any adjudicative disposition, or terms for an adjudicative disposition, including penalties provided by the act. ¶

Deleted: (4) If the recipient of a notice of alleged noncompliance fails to file a written answer or otherwise fails to file an appeal or a request for a hearing, the notice of alleged noncompliance is deemed admitted and the Commission may find the respondent to be in noncompliance and impose a penalty or penalties pursuant to the act. Furthermore, filing a notice of appeal will automatically constitute ... [1]

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factual averments made in the petition, and shall set forth the facts and state concisely the matters of law upon which the respondent relies. Matters not specifically denied will be deemed admitted. The notice of alleged noncompliance will include a statement to this effect.

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(f) Failure to file an answer within the 30-day period or the filing of general denials will be deemed an admission of the averments of the notice of alleged noncompliance. The notice of alleged noncompliance will include a statement to this effect.

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(g) To the extent that a respondent does not file an answer, a request by the respondent for a hearing must be in writing and must be received at the Commission within 30 days of service of the notice of alleged noncompliance upon the respondent. Failure to submit a timely request for a hearing will be deemed a waiver of a hearing, so that a final order may be entered against the respondent without a hearing.

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(i) A request for a hearing may be set forth within an answer to the notice or it may be submitted separately. ¶

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(h) If the recipient of a notice of alleged noncompliance fails to file a written answer or otherwise fails to file an appeal or a request for a hearing, the notice of alleged noncompliance is deemed admitted and the Commission may find the respondent to be in noncompliance and impose a penalty or penalties pursuant to the act. Furthermore, filing a notice of appeal will automatically constitute a request for a hearing.

(i) If the respondent does not file an answer or otherwise submit a timely request for a hearing, the Investigative Division will have an additional 7 days beyond the respondent's deadline in which to submit a written request for a hearing.

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(j) The Commission may *sua sponte* schedule a hearing if it is determined that a hearing is needed to resolve contested facts to make a final determination.

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(k) If a hearing is requested by the respondent or Investigative Division or is scheduled by the Commission, the respondent will be given access to evidence intended to be used by the Investigative Division at the hearing, as well as exculpatory evidence obtained by the Investigative Division.

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(l) Access to evidence does not include an original complaint or the name of a complainant, information which is otherwise privileged, or information not within paragraph (k).

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(m) A hearing under section 1309-A(b) of the act (relating to hearing) as to a negligent failure to register or report will be public and will be conducted by the Commission in accordance with sections 1107(14) and 1108(e) of the Ethics Act (relating to powers and duties of commission; and findings report), and to the extent applicable, the related provisions of Part I (relating to State Ethics Commission). The Investigative Division bears the burden of proof.

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(n) The hearing officer or the parties may request that briefs be presented. The filing of briefs shall be in accordance with the procedures for filing briefs under § 21.27 (relating to briefs) to the extent

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applicable.

(c) After the opportunity for a hearing has been provided, and following the submission of any briefs, the Commission will determine, based upon the record before it, whether the respondent was required to register or report under the act; whether the failure to register or report was negligent; and if the failure was negligent, the amount of the administrative penalty to be imposed. At least four members of the Commission present at a meeting must find a violation by clear and convincing proof.

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(p) If the Commission finds that the failure to register or report was intentional, it will refer the matter to the Attorney General for investigation and prosecution, and if the person is an attorney at law, the Commission will also refer the matter to the Board.

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(q) The determination of the Commission will be in the form of a final order with findings and reasons for the adjudication.

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(r) At any time prior to a final adjudication by the Commission, the Investigative Division will have authority to negotiate settlements and to enter into settlement agreements to resolve matters under this section. Settlement agreements will be subject to review and approval by the Commission. Settlement agreements may include arrangements for deferral or termination of proceedings prior to any adjudicative disposition, or terms for an adjudicative disposition, including penalties provided by the act.

(s) Requests for reconsideration may be submitted to the Commission. The Commission will consider and rule upon requests for reconsideration under the procedures set forth in § 21.29(b) and (d)–(f) (relating to finality; reconsideration) to the extent applicable.

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(t) The Commission will notify the Board of any administrative/civil penalty imposed by the Commission against an attorney at law for failure to register or report.

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(u) A complainant will be notified of the final resolution of the matter.

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(v) The official record of the case before the Commission will be publicly available.

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(x) The files of the Investigative Division will not be publicly available.

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Cross References

This section cited in 51 Pa. Code § 63.1 (relating to intentional violations); 51 Pa. Code § 63.3 (relating to late or deficient filings–Commission proceedings under section 1304-A or 1305-A of the act); and 51 Pa. Code § 63.6 (relating to administrative penalties for late or deficient filings).

§ 63.5. Investigative process for late or deficient filings.

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The investigative process for matters under section 1304-A or 1305-A of the act (relating to registration; and reporting) will include the following procedures:

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(a) The Commission, through its Executive Director, may conduct a preliminary inquiry into any alleged negligent violation of section 1304-A or 1305-A of the act. Preliminary inquiries will be conducted under the procedures for preliminary inquiries set forth in section 1108 of the Ethics Act (relating to investigations by commission) and, to the extent applicable, § 21.3 (relating to preliminary inquiries).

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(b) The Commission, through its Executive Director, may initiate an investigation and hold a hearing concerning alleged negligent violations of section 1304-A or 1305-A of the act, in accordance with sections 1107 and 1108 of the Ethics Act (relating to powers and duties of commission; and investigations by commission) and, to the extent applicable, the related provisions of §§ 21.1–21.3, 21.5 and 21.21–21.27 (relating to complaints, investigations, preliminary inquiries and hearings).

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(1) If the respondent does not submit a timely request for a hearing, the Investigative Division will have an additional 7 days beyond the respondent's deadline in which to submit a written request for a hearing.

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(2) The Commission may *sua sponte* schedule a hearing if it is determined that a hearing is needed to resolve any contested facts to make a final determination.

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(c) At any time prior to a final adjudication by the Commission, the Investigative Division will have authority to negotiate settlements and to enter into settlement agreements to resolve matters under this section. Settlement agreements will be subject to review and approval by the Commission. Settlement agreements may include arrangements for deferral or termination of proceedings prior to any adjudicative disposition, or terms for an adjudicative disposition, including penalties provided by the act.

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(d) The Commission will decide cases, issue orders and rule upon requests for reconsideration concerning alleged negligent violations of section 1304-A or 1305-A of the act, in accordance with sections 1107 and 1108 of the Ethics Act and, to the extent applicable, the related provisions in §§ 21.28–21.30 (relating to decision; finality; reconsideration; and effect of order). At least four members of the Commission present at a meeting must find a violation by clear and convincing proof.

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Cross References

This section cited in 51 Pa. Code § 63.3 (relating to late or deficient filings–Commission proceedings under section 1304-A or 1305-A of the act); and 51 Pa. Code § 63.6 (relating to civil penalties for late or deficient filings).

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§ 63.6. Administrative penalties for late or deficient filings.

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Following a non-investigative process under § 63.4 (relating to non-investigative process for late or deficient filings), or an investigative process under § 63.5 (relating to investigative process for late or deficient filings), if the Commission finds negligent failure(s) to register or report as required by the act, the Commission may, upon the vote of at least four of its members present, levy one or more administrative penalties as provided for in this section.

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(a) Each negligent failure to register or report as required by the act is punishable by an administrative penalty of up to \$50-per-day for each day the registration statement or report is delinquent or deficient.

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(b) An administrative penalty will be calculated from the first day the registration statement or report is delinquent or deficient, through the date a complete and accurate registration statement or report is filed or the Commission decides the matter, whichever occurs first.

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(c) In determining whether to impose an administrative penalty that is less than \$50-per-day, the Commission may consider factors including the following:

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(1) Whether the respondent contacted the Commission or took any meaningful measures to attempt to remedy the delinquency, deficiency or false statement.⁵

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(2) Whether the respondent has raised any justifiable excuse such as, for example, the following:

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(i) The unavailability of records due to loss, theft or destruction through no fault of the respondent.

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(ii) Incapacitating physical or mental illness, hospitalization, accident involvement, or death of a person required to register or report, a person whose participation is essential to the filing, or a member of the immediate family of the person(s).

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(3) Whether the record establishes that the matter involved the first instance that the respondent was subject to the registration/reporting requirements of the act.

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(4) Whether Commission records indicate that the Commission has previously notified the respondent, in writing, of other delinquent, deficient, or false registration statements or reports.

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⁵ On April 11, 2007, the Committee asked to change the term "falsehood" to "false statement." Doing so is consistent with §§ 63.3(b)(3), 63.4(1), 63.4(3), & 63.6(3)(iv). Furthermore, Act 134 does not use the word "falsehood," but uses the word "false" at sections 1307-A(c), 1309-A(a)(2)(ii)(c) and 1309-A(e)(2).

(5) Whether proceedings have previously been initiated against the respondent under the act, either by the Commission or by the Office of Attorney General.

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(6) Whether there are any other factors that should be considered as aggravating or mitigating factors in the case.

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(d) The imposition of an administrative penalty by the Commission will not preclude a criminal prosecution for intentional violation of the act.

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§ 63.7. Commission decisions as to late or deficient filings.

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The determination of the Commission will be in the form of a final order with findings and reasons for the adjudication.

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(4) If the recipient of a notice of alleged noncompliance fails to file a written answer or otherwise fails to file an appeal or a request for a hearing, the notice of alleged noncompliance is deemed admitted and the Commission may find the respondent to be in noncompliance and impose a penalty or penalties pursuant to the act. Furthermore, filing a notice of appeal will automatically constitute a request for a hearing.

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If the recipient of a notice of alleged noncompliance fails to file an appeal, a written answer or a request for a hearing, the notice of alleged noncompliance is deemed accepted.